

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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CANADA DRY DELAWARE VALLEY	:
BOTTLING COMPANY and CANADA	:
DRY POTOMAC CORPORATION,	: 07 Civ. 8037 (SHS)
	:
Petitioners,	:
	:
-against-	:
	:
HORNELL BREWING CO., INC., D/B/A	:
FEROLITO, VULTAGGIO & SONS,	:
	:
Respondent.	:
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**DECLARATION OF JOHN TAGLIENTI**

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I, John Taglienti, declare and affirm under the penalties of perjury that:

1. I am the Executive Vice President for Sales and Marketing for Canada Dry Delaware Valley Bottling Company (“CDDV”) and Canada Dry Potomac Corporation (“CDP”).
2. I am authorized to make the following statements on behalf of CDDV and CDP.
3. I submit this Declaration in support of CDDV and CDP’s Reply Memorandum in Support of their Motion to Compel Compliance with this Court’s Judgment and for Contempt against Hornell Brewing Co., Inc. (“Hornell”).

**DISPUTED FACTS REGARDING THE 20 OUNCE PLASTIC PACKAGE**

4. At a meeting on February 4, 2008, Hornell presented CDDV and CDP with a plan to sell its new 20 ounce plastic package.
5. At that time, Hornell presented a pricing strategy whereby this new package would be sold to retail accounts for \$18.99 per case, with a pre-set price of \$1.19 per bottle to the consumer.

6. At a follow-up meeting on February 20, 2008, CDDV and CDP restated their interest in distributing this new package, though they could not agree to permit Hornell to dictate its prices to CDDV's and CDP's customers. A true and correct copy of an e-mail summary of that meeting from John Welsh to Mike Dooley is attached as Exhibit 1.

7. The parties agreed to roll out this new package in late April or early May 2008.

*Id.*

8. Consistent with this agreement, CDDV and CDP placed orders for Hornell's new 16 and 20 ounce plastic packages on or about April 23, 2008.

9. On April 24, 2008, Hornell informed CDDV and CDP that Hornell would not fill the orders because CDDV and CDP refused to accept Hornell's required pricing to retailers in their markets. A true and correct copy of an e-mail summarizing the April 24, 2008, meeting with Hornell from Mike Dooley to John Welsh and myself is attached as Exhibit 2.

10. While Hornell may have intended that its new 20 ounce plastic package be sold to consumers at no more than \$1.19 per bottle, our audit of retailers in our markets has shown that retailers have not necessarily followed Hornell's pricing strategy.

11. On April 24, 2008, Mike Dooley had a meeting with John Welsh, at which Dooley informed him that retailers are selling 20 ounce plastic bottles at \$1.39, \$1.49 and \$1.59 per bottle.

12. CDDV and CDP have never agreed to permit a manufacturer to set their everyday resale price to their customers, to dictate their profit margins, or to condition a grant of exclusivity on whether an agreeable price can be negotiated.

13. Several aspects of Hornell's story regarding its direct distribution of 20 ounce plastic bottles to Exxon/Mobil are inaccurate.

14. At the price offered by Hornell to purchase this package and the price required by Hornell to sell this package to Exxon/Mobil, CDDV's and CDP's gross profit margin on the new 20 ounce plastic package would be 21%, not 23.6%.<sup>1</sup>

15. This profit margin is lower than even the lowest profit margin realized by CDDV and CDP on any AriZona package and any other single-serve package of New Age beverages to convenience stores — including Snapple.

16. I never informed John Welsh that CDDV and CDP would not sell the new 20 ounce plastic package at less than \$21.99 per case; instead, I said that CDDV and CDP were interested in selling the package so the *average* net price would be \$21.99.

17. Hornell also is incorrect when it asserts that Petitioners could not have distributed this package to Exxon/Mobil for \$18.99 on an exclusive basis.

18. The profit margin realized by CDDV and CDP on any package is a function of both purchase price and sale price.

19. Had Hornell negotiated a fair profit margin for CDDV and CDP, Hornell would not have had any problem guaranteeing its price of \$18.99 to Exxon/Mobil stores in their territories.

20. Hornell's assertion that CDDV and CDP could not obtain orders for AriZona products from Exxon/Mobil is incorrect.

21. CDDV and CDP have been selling AriZona Big Cans and AriZona 20 ounce glass bottles to Exxon/Mobil.

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<sup>1</sup> Hornell is apparently relying on my calculations in a letter dated February 27, 2008. My calculation in that letter was incorrect.

22. However, Exxon/Mobil advised CDDV and CDP in December 2007 that because it would be buying the new 20 ounce plastic package of AriZona Iced Tea from Hornell, it would discontinue all purchases of 20 ounce glass bottles and 23 ounce Big Cans of AriZona Iced Tea from CDDV and CDP. A true and correct copy of a December 2007 e-mail from Todd McFarland, category manager of Exxon/Mobil, is attached as Exhibit 3.

23. Exxon/Mobil is an example of a retailer who will not carry three single-serve packages of the same flavor, and one can surmise that other retailers in our markets will react similarly.

24. Contrary to Mr. Welsh's assertion at Paragraph 4 of his Declaration, the 20 ounce plastic package is replacing the 20 ounce glass bottles at this account.

#### **DISPUTED FACTS REGARDING THE 16 OUNCE PLASTIC PACKAGE**

25. Hornell's assertion that CDDV and CDP adhere to the same terms and conditions for the 16 ounce plastic package that they had adhered to for the 16 ounce glass bottle is untrue.

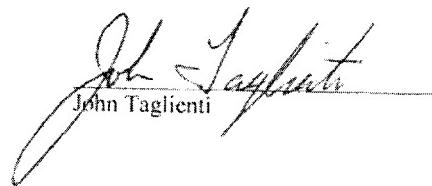
26. Hornell has never attempted to condition exclusivity of a particular package on its ability to dictate the every-day retail price at which the package was sold by CDDV or CDP in their territories.

27. Because Hornell insisted on dictating the every-day retail price for its new 16 ounce plastic/12 pack and refused to fill orders, CDDV and CDP never had the opportunity to run promotions as required by the Paragraph 9 of the Consent Award.

28. Further, Hornell never presented CDDV or CDP with the 16 ounce/24 pack plastic package, yet it is actively being distributed in club stores, as evidenced by the photographs attached as Exhibit 9 to the Klings Declaration submitted in support of the Motion for Compliance.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 5, 2008.



A handwritten signature in black ink, appearing to read "John Taglienti". Below the signature, the name "John Taglienti" is printed in a smaller, sans-serif font.